

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LINDA L. WILLINGHAM,
Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of
Social Security,
Defendant.

CASE NO. C05-5003KLS

ORDER REVERSING THE
COMMISSIONER'S DECISION
TO DENY BENEFITS

Plaintiff, Linda L. Willingham, has brought this matter for judicial review of the denial of her application for disability insurance benefits. The parties have consented to have this matter be heard by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Magistrates Rule 13. After reviewing the parties' briefs and the remaining record, the undersigned hereby finds and ORDERS as follows:

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is forty-six years old.¹ Tr. 30. She has a general equivalency diploma and past work experience as a hand packer, a sales clerk, a cashier, a receptionist, and an export-import expeditor.

¹Plaintiff's date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 Tr. 27, 94, 99.

2 Plaintiff filed an application for disability insurance benefits on June 21, 2001, alleging disability as
 3 of September 15, 1997, due to carpal tunnel syndrome, herniated and deteriorating discs, and depression.
 4 Tr. 15-16, 82-84, 93. Her application was denied initially and on reconsideration. Tr. 30-32, 37. Plaintiff
 5 requested a hearing, which was held on August 5, 2003, before an administrative law judge (“ALJ”). Tr.
 6 356. At the hearing, plaintiff, represented by counsel, appeared and testified, as did a vocational expert. Tr.
 7 356-403.

8 On March 31, 2004, the ALJ issued a decision determining plaintiff to be not disabled, finding
 9 specifically in relevant part as follows:

- 10 (1) at step one of the disability evaluation process, plaintiff had not engaged in
 11 substantial gainful activity since her alleged onset date of disability;
- 12 (2) at step two, plaintiff had “severe” impairments consisting of bilateral carpal
 13 tunnel syndrome, status post two release surgeries, and degenerative disc disease
 14 at C6-7;
- 15 (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any of
 16 those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 17 (4) at step four, plaintiff had the residual functional capacity to perform a modified
 18 range of light work, which did not preclude her from being able to perform her
 19 past relevant work as a receptionist; and
- 20 (5) at step five, plaintiff could perform other jobs existing in significant numbers in
 21 the national economy.

22 Tr. 28-29. Plaintiff’s request for review was denied by the Appeals Council on November 5, 2004, making
 23 the ALJ’s decision the Commissioner’s final decision. Tr. 1, 6; 20 C.F.R. § 404.981.

24 On January 4, 2005, plaintiff filed a complaint in this court seeking judicial review of the ALJ’s
 25 decision. (Dkt. #1). Plaintiff argues that decision should be reversed and remanded for an award of benefits,
 26 because:

- 27 (a) the ALJ erred in finding none of plaintiff’s mental impairments to be severe;
- 28 (b) the ALJ erred in posing a hypothetical question to the vocational expert that did
 not include all of plaintiff’s mental and physical impairments; and
- (c) the ALJ erred in finding plaintiff was capable of performing her past relevant
 work as a receptionist and other work existing in significant numbers in the
 national economy.

The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set

1 forth below, finds that this matter should be remanded for further administrative proceedings.

2 DISCUSSION

3 This court must uphold the Commissioner's determination that plaintiff is not disabled if the
 4 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole to
 5 support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is
 6 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson
 7 v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than
 8 a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir.
 9 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than
 10 one rational interpretation, the court must uphold the Commissioner's decision. Allen v. Heckler, 749 F.2d
 11 577, 579 (9th Cir. 1984).

12 I. Plaintiff's Date Last Insured

13 To be entitled to disability insurance benefits, plaintiff "must establish that her disability existed on
 14 or before" the date her insured status expired. Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998); see also
 15 Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1460 (9th Cir. 1995) (social security
 16 statutory scheme requires disability to be continuously disabling from time of onset during insured status to
 17 time of application for benefits, if individual applies for benefits for current disability after expiration of
 18 insured status). Plaintiff's date last insured was December 31, 2001. Tr. 15, 31. Therefore, to be entitled to
 19 disability insurance benefits, plaintiff must establish she was disabled prior to or as of that date. Tidwell, 161
 20 F.3d at 601.

21 II. The ALJ Properly Found Plaintiff Did Not Have a Severe Mental Impairment

22 To determine whether a claimant is entitled to disability benefits, the ALJ engages in a five-step
 23 sequential evaluation process. 20 C.F.R. § 404.1520. At step two of that process, the ALJ must determine
 24 if an impairment is "severe". Id. An impairment is "not severe" if it does not "significantly limit" a
 25 claimant's mental or physical abilities to do basic work activities. 20 C.F.R. §§ 404.1520(a)(4)(iii), (c);
 26 Social Security Ruling ("SSR") 96-3p, 1996 WL 374181 *1. Basic work activities are those "abilities and
 27 aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b); SSR 85- 28, 1985 WL 56856 *3.

28 An impairment is not severe only if the evidence establishes a slight abnormality that has "no more

1 than a minimal effect on an individual[']s ability to work.” See SSR 85-28, 1985 WL 56856 *3; Smolen v.
 2 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988). Plaintiff
 3 has the burden of proving that her “impairments or their symptoms affect [her] ability to perform basic work
 4 activities.” Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599,
 5 601 (9th Cir. 1998). The step two inquiry described above, however, is a *de minimis* screening device used
 6 to dispose of groundless claims. Smolen, 80 F.3d at 1290.

7 Plaintiff argues the ALJ erred in not finding her depression, anxiety and/or dependent personality
 8 disorder to be severe impairments. The undersigned disagrees. With respect to plaintiff’s depression, the
 9 ALJ found as follows:

10 There is no evidence that depression more than minimally affected the claimant’s ability
 11 to perform basic work activities before her date last insured, December 31, 2001. The
 12 record before that date shows a handful of episodes in which the claimant complained of
 13 depressive symptoms. But evidence of these episodes is few and far between and does
 14 not address the effect, if any, the episodes had on the claimant’s ability to perform work-
 related activities. Therefore, the claimant’s alleged mental impairments cannot be
 deemed “severe” impairments. I make no finding regarding the severity of the
 claimant’s alleged depression after December 31, 2001.

15 Tr. 22. The undersigned finds the ALJ’s determination here to be well supported by substantial evidence in
 16 the record.

17 Plaintiff asserts the record shows she suffered from and reported symptoms of depression, anxiety
 18 and/or dependant personality disorder. While the record does indicate that plaintiff at times reported and
 19 was noted to have depressive symptoms, there is little evidence in the record that those symptoms resulted
 20 in any significant work-related limitations prior to her date last insured. See Tr. 261-62, 264, 269, 279-80,
 21 288-90, 292-95, 311, 313-14, 321, 323-24, 328-30, 332-33, 335-37. To the extent that such limitations are
 22 indicated in the record, furthermore, the evidence shows they were largely situational and for the most part
 23 transitory. See *id.* Dr. Jeff Hart did find plaintiff to be “not gainfully employable” based on her mental
 24 impairments. Tr. 342-49. Dr. Hart, however, did not evaluate plaintiff until late March 2004, long after her
 25 date last insured, and thus his opinions are not relevant to the time period at issue here.²

26 Plaintiff next points to the global assessment of functioning (“GAF”) scores with which she has been

27 ²Although it is possible for a claimant to establish “continuous disabling severity by means of a retrospective diagnosis,”
 28 such is not the case here, as Dr. Hart provided no opinion regarding plaintiff’s mental health status or ability to work prior to the
 date her insured status expired. Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1461 (9th Cir. 1995) (claimant
 is eligible for coverage only if current period of disability extends back continuously to onset date prior to date last insured).

1 diagnosed by various sources in the record. Those scores prior to plaintiff's date last insured ranged from a
2 low of 50 to a high of 65. Tr. 275, 293, 311, 314, 321, 324. The ALJ noted that according to the
3 *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), a GAF score of 50 indicated "serious
4 symptoms or a serious impairment in social, occupational, or school functioning," a GAF score of 51 to 60
5 indicated "moderate symptoms or moderate difficulty in social, occupational, or school functioning," and a
6 GAF score of 61 to 70 indicated "some mild symptoms or some difficulty in social, occupational, or school
7 functioning, but generally functioning pretty well." Tr. 21-22.

8 The undersigned, however, does not find that plaintiff's GAF scores establish she suffered from a
9 severe mental impairment. First, as indicated above, the GAF score appears to cover social, occupational or
10 school functioning, without further defining the specific mental impairment or impairments measured. In
11 addition, only one of the GAF scores with which plaintiff was assessed was provided by an "acceptable
12 medical source," as that term is defined in the Social Security Regulations. See Gomez v. Chater, 74 F.3d
13 967, 970-71 (9th Cir. 1996) (acceptable medical sources include licensed physicians and psychologists); 20
14 C.F.R. § 404.1513(a), (d). That GAF score also was the highest (60-65) and most recent score provided,
15 thereby indicating that plaintiff's symptoms were mostly mild. Tr. 293. Indeed, the majority of plaintiff's
16 current GAF scores were within the 60 to 65 range, and on at least one occasion her highest GAF score
17 within the past year was deemed to be 70. See Tr. 293, 311, 314, 321, 324. Finally, as discussed above, the
18 clinical and other diagnostic notes in the record indicate that those mental limitations she did exhibit were
19 for the most part mild, and largely situational or transitory.

20 In addition, while plaintiff has been diagnosed by the mental health therapists she saw prior to her
21 date last insured with a dependant personality disorder and generalized anxiety (Tr. 275, 329, 331), she has
22 not been so diagnosed by a psychiatrist, psychologist or other "acceptable medical source." In any event, as
23 with plaintiff's depressive symptoms, the evidence in the record fails to show any symptoms that she did
24 have stemming from these problems caused significant, or more than transitory, work-related limitations.³

25
26 ³Plaintiff points to evidence in the record indicating that she reported suicidal ideation at times, and that one of her
27 mental health therapists even issued a "crisis alert" for her. See Tr. 261-62, 264, 280, 324, 332-33, 337. At other times, however,
28 she was noted to have no suicidal ideation or plan or intent to harm herself, and thus was not considered to be in any imminent
risk. Tr. 269, 311, 314, 328, 330, 336. In any event, the mere fact that a claimant has depressive or other mental health
symptoms, does not in itself establish the presence of a "severe" impairment, let alone disability. Rather, the claimant must show
that those symptoms have resulted in significant work-related limitations. As discussed above, plaintiff has not done so here.

1 The undersigned, therefore, also finds that the ALJ did not err in failing to specifically address plaintiff's
2 alleged dependant personality disorder and generalized anxiety.

3 Plaintiff next argues the ALJ erred in not calling a psychiatric expert to testify at the hearing. She
4 has failed to establish, however, that the ALJ was required to do so. An ALJ's duty to further develop the
5 record "is triggered only when there is ambiguous evidence or when the record is inadequate to allow for
6 proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); see also SSR
7 96-2p, 1996 WL 374188 *4 ("[T]he ALJ . . . may need to consult a medical expert to gain more insight into
8 what the clinical signs and laboratory findings signify in order to decide whether a medical opinion is
9 well-supported or whether it is not inconsistent with other substantial evidence in the case record."). A
10 review of the medical evidence in the record does not clearly indicate that it is sufficiently ambiguous or
11 inadequate so as to require the testimony of a medical expert. As discussed above, that evidence fails to
12 show that plaintiff had significant work-related mental functional limitations.

13 Plaintiff further argues the ALJ improperly substituted his own opinion for those of the psychiatric
14 and other medical sources in the record regarding her mental limitations. See Gonzalez Perez v. Secretary
15 of Health and Human Services, 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not substitute own opinion for
16 findings and opinion of physician); McBrayer v. Secretary of Health and Human Services, 712 F.2d 795,
17 799 (2nd Cir. 1983) (ALJ cannot arbitrarily substitute own judgment for competent medical opinion); Gober
18 v. Mathews, 574 F.2d 772, 777 (3rd Cir. 1978) (ALJ not free to set own expertise against that of physician
19 who testified before him). Again, however, there is only one opinion from an "acceptable medical source"
20 in the record concerning plaintiff's mental impairments during the relevant time period (Tr. 288-98), and
21 that opinion generally comports with the ALJ's findings.

22 Lastly, plaintiff argues the ALJ erred in failing to use either a psychiatric review technique form or a
23 mental residual functional capacity assessment form to evaluate her mental impairments. To evaluate the
24 severity of a claimant's mental impairments, the Commissioner must "follow a special technique at each
25 level in the administrative review process." 20 C.F.R. § 404.1520a(a). Under this technique, the
26 Commissioner first determines whether the claimant has a medically determinable impairment. 20 C.F.R. §
27 404.1520a(b)(1). If the claimant does have such an impairment, then the Commissioner rates the "degree of
28 functional limitation" resulting from that impairment. 20 C.F.R. § 404.1520a(b)(2).

1 Rating the degree of functional limitation involves consideration of four functional areas: activities
2 of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. 20
3 C.F.R. § 404.1520a(c). If a claimant's degree of limitation in the first three areas is rated "none" or "mild"
4 and "none" in the fourth area, then the claimant's mental impairment generally is considered not severe,
5 unless evidence in the record otherwise indicates there is more than a minimal limitation in the claimant's
6 ability to do basic work activities. 20 C.F.R. § 404.1520a(d)(1). At the initial and reconsideration levels of
7 the administrative review process, "a standard document" is completed to record how the above technique
8 was applied. 20 C.F.R. § 404.1520a(e). At the ALJ hearing level, documentation of the technique is done
9 in the decision itself. Id.

10 The ALJ, therefore, is not required to complete a separate form to document the above technique.
11 Nevertheless, as just noted, documentation of the technique must be included in the ALJ's decision itself. It
12 does not appear the ALJ did so in this case. Defendant argues that the ALJ was not required to do so in
13 this case, because he did not find plaintiff to have any medically determinable impairment. See 20 C.F.R. §
14 404.1520a(b)(1) (ALJ first must determine if claimant has medically determinable impairment). There is
15 some logic to this argument, in that the ALJ never expressly found plaintiff's alleged depression to be a
16 medically determinable impairment, even though the ALJ did go on to determine that her depression was
17 not a "severe" impairment. See Tr. 20, 22, 28.

18 The record itself also fails to indicate plaintiff was ever actually diagnosed as having depression by
19 an "acceptable medical source." See 20 C.F.R. § 404.1527(a) (mental or physical impairment must result
20 from anatomical, physiological, or psychological abnormalities, which are demonstrable by medically
21 acceptable clinical and laboratory diagnostic techniques and other medical evidence, such as opinions from
22 physicians and psychologists or other acceptable medical sources). For example, plaintiff was evaluated by
23 a psychologist as part of an interdisciplinary pain evaluation in late December 2002. However, she was
24 found to have only "[p]ossible" mild depression. Tr. 288. A "specific differential diagnosis" regarding her
25 "[r]eported intermittent mood swings and symptoms of depression and anxiety" thus was deferred. Tr. 292.
26 Even plaintiff's mental health therapists were equivocal with respect to their diagnoses of her depression,
27 describing it on two occasions in October 2002, as "R/O Major Depressive D/O, Single Episode, Mild." Tr.
28 321, 324. Similarly, no acceptable medical source has assessed plaintiff with either generalized anxiety or a
dependant personality disorder. See Tr. 275, 329, 331.

1 The undersigned thus finds the ALJ did not err in failing to include in his decision documentation of
2 the special technique used in determining the severity of plaintiff's impairments, because there is little
3 evidence in the record that any acceptable medical source actually had diagnosed plaintiff with a medically
4 determinable mental impairment. To the extent the ALJ did err in this regard, the undersigned finds such
5 error to be harmless. See Batson v. Commissioner of the Social Security Administration, 359 F.3d 1190,
6 1197 (9th Cir. 2004) (applying harmless error standard); Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir.
7 1990) (holding ALJ committed harmless error). This is because, as discussed above, there is little evidence
8 of any significant work-related mental functional limitations that are more than situational and transitory in
9 nature, which would indicate plaintiff suffers from a severe mental impairment.

10 III. The Hypothetical Question the ALJ Posed to the Vocational Expert Was Valid

11 If a disability determination "cannot be made on the basis of medical factors alone at step three of
12 the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and
13 assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A
14 claimant's residual functional capacity assessment is used at step four to determine whether he or she can do
15 his or her past relevant work, and at step five to determine whether he or she can do other work. Id.
16 Residual functional capacity thus is what the claimant "can still do despite his or her limitations." Id.

17 A claimant's residual functional capacity is the maximum amount of work the claimant is able to
18 perform based on all of the relevant evidence in the record. Id. However, a claimant's inability to work
19 must result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those
20 limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a
21 claimant's residual functional capacity, the ALJ also is required to discuss why the claimant's "symptom-
22 related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the
23 medical or other evidence." Id. at *7.

24 The ALJ assessed plaintiff with the following residual functional capacity:

25 [T]he claimant retains the ability to stand, and/or walk a total of six hours in an eight
26 hour day, but when sitting, she must be allowed to change to a standing position at will;
27 to lift 20 pounds occasionally from floor to waist, 10 pounds frequently from floor to
28 waist, 15 pounds occasionally to frequently from waist to shoulder, and 10 pounds
occasionally from shoulder to head; to carry 15 pounds occasionally and 5 pounds
frequently for 100 feet; to push 45 pounds occasionally and 20 pounds frequently; to
pull 10 pounds occasionally and 5 pounds frequently; to reach overhead with objects
weighing 5 pounds; to perform fine manipulation with the dominant hand occasionally,

1 meaning up to 1/3 of the day.

2 Tr. 26-27. At the hearing, the ALJ posed the following hypothetical question to the vocational expert:

3 Let me give you a hypothetical. I'll ask you just to assume what I set out in the
4 hypothetical and disregard the, the testimony or anything you've seen in the written
5 record, except to the extent that I ask you to include that. The hypothetical involves a
6 female who is born in January of 1959. So, she's currently age 44, and she's claiming
7 disability since September of 1997, when she was 38. So, for the period we're looking
8 at the age range is 38 to 44. She has a high school equivalency diploma, so 12 years of
9 education, and this lady's work history is the same as Ms. Willingham. So, there we
10 incorporate everything that you've seen in the written record about that as well as the
11 testimony. She has sustained an injury to her neck and has had some problems with her
12 hands, and has other problems of a physical and mental nature, but from a vocational
13 standpoint what is significant is how she is limited by all of these. And at least for
14 maybe just the start I'll turn to a, a physical capacity evaluation made -- this was at the
15 pain center. And this you don't have. This is Exhibit 7F, page 19 [Tr. 241],
16 performance based physical capacity examination. Some of this is not filled in, so I'm
17 going to say by transposing another one -- let's see, this will be the disability
18 determination unit's 9 -- Exhibit 9F [Tr. 255-59]. So, that's -- so anyway, we're getting
19 to it. So that's -- it says -- let's say that she can sit -- let's say that she can sit
20 cumulatively in an eight hour work day about six hours or more, and the same goes for
21 standing and/or walking combination, cumulatively six hours or more. Lifting, 20
22 pounds occasionally, from, from floor to waist, floor to waist -- floor to the waist or
23 knuckle? . . .

24 Okay. It's floor to waist or knuckle. That's 20 pounds occasional. 10 frequently floor
25 to waist or knuckle. Now, from waist or knuckle to shoulder, we're moving up here, 15
26 pounds occasionally or frequently, and even -- going up even higher, from shoulder to
27 overhead, 10 pounds occasionally, 5 frequently. And then carry 15 pounds occasionally
28 for 100 feet, 5 pounds frequently for 100 feet. Now, we also have push/pull force
limitations, 45 pounds push occasionally, 20 pounds push frequently. Pull, now, pull 20
pounds occasional, 5 pounds frequently. I can go over this again with you if you need it.
It looks to me at this point that we have probably more or less in a light capacity here.
Now -- oh, here's another one. Reach overhead with weight, five pounds. I'm going to
add another one here, in the category of a manipulative limitation. With the dominant
right hand, she's limited to -- this is fine manipulation, fingering limited, meaning that
she can only do this occasionally, meaning up to one third of a normal workday, fine
manipulation with the dominant right hand. She's had carpal tunnel surgery two times.

21 Tr. 391-93. Plaintiff argues the ALJ failed to include in the above hypothetical question all of her mental
22 and physical limitations, thereby making that question unreliable. The undersigned disagrees.

23 An ALJ's findings will be upheld if the weight of the medical evidence supports the hypothetical
24 posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d
25 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore must be reliable in light of the
26 medical evidence to qualify as substantial evidence. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988).
27 Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported by
28 the medical record." Embrey, 849 F.2d at 422 (citations omitted). The ALJ, however, may omit from that

1 description those limitations he finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001)
2 (because ALJ included all limitations that he found to exist, and those findings were supported by
3 substantial evidence, ALJ did not err in omitting other limitations claimant failed to prove).

4 With respect to her mental impairments, plaintiff again argues the ALJ should have found them to be
5 severe, and that had the ALJ done so and included limitations stemming therefrom in the hypothetical
6 question he posed, the vocational expert likely would have testified that she was disabled. As discussed
7 above though, the ALJ did not err in finding none of plaintiff's impairments to be severe. In addition,
8 although plaintiff asserts the vocational expert likely would have found her disabled based on her mental
9 limitations, she cites to no evidence in the record to support that assertion. As such, the ALJ did not err in
10 excluding such limitations from the hypothetical question.

11 Plaintiff further argues the ALJ erred in excluding from the hypothetical question the reaching and
12 fingering limitations noted by Dr. David L. Deutsch, a non-examining consulting physician, in the physical
13 residual functional capacity assessment form he affirmed in late February 2001. Tr. 255-59. On that form,
14 Dr. Deutsch opined that plaintiff was limited to occasional bilateral overhead reaching⁴ and to occasional
15 bilateral fingering (i.e., fine manipulation). Tr. 257. Plaintiff asserts that although the ALJ stated at the
16 hearing that he was "transposing" this form – the Exhibit 9F referred to by the ALJ (Tr. 392) – he did not
17 include either of these limitations. The ALJ's statements, however, indicate that he was "transposing" this
18 exhibit only because the physical capacities evaluation he also referred to at the hearing, Exhibit 7F, page 19
19 (Tr. 241), contained gaps that needed to be filled in (Tr. 392). None of those "gaps" though, concerned
20 plaintiff's ability to reach overhead or perform fine manipulation. See Tr. 241.

21 Plaintiff nevertheless asserts that the medical evidence in the record supports the overhead reaching
22 limitation adopted by Dr. Deutsch, because she has been diagnosed with a small central protrusion and/or
23 herniation in her back, with radiculopathy. See Tr. 140, 184, 197, 199. However, the medical evidence in
24 the record as a whole instead supports the ALJ's determination here. Thus, in mid-December 1997, for
25 example, Steven L. Brack, D.O., found plaintiff had "full range of motion" in her cervical spine and normal
26

27 ⁴Although Dr. Deutsch did mark the "[l]imited" box for the category "[r]eaching in all directions (including overhead)," the physical residual functional capacity assessment form also contains a section for describing "how the activities checked
28 'limited' are impaired." Tr. 257. In that section, Dr. Deutsch indicated plaintiff was limited to only occasional bilateral overhead reaching. Id. As such, it does not appear he felt she was limited in her ability to reach in all directions.

1 motor strength. Tr. 197. He indicated she had limitations in her ability to reach late February 1998, but did
2 not specify what those were. Tr. 164. Plaintiff continued to have full cervical range of motion and normal
3 motor strength in late March 1998. Tr. 190.

4 In early June 2001, Dr. Brack once more noted plaintiff had normal motor strength, and he found
5 her shoulder range of motion to be “satisfactory.” Tr. 187. The record does contain a clinic note from Dr.
6 William J. Morris that states that plaintiff’s neck would “limit her as far as overhead work or heavy lifting
7 beyond light or sedentary activities.” Tr. 245. This assessment though, largely comports with the overhead
8 reaching limit the ALJ imposed on plaintiff. See Tr. 27, 392-93. In early November 2002, Dr. Steven
9 Litsky found plaintiff to have normal muscle strength in her upper and lower extremities and normal range
10 of motion in her back and shoulders. Tr. 301. These findings were reproduced during the interdisciplinary
11 pain evaluation she underwent in late December 2002. Tr. 291, 296. Indeed, plaintiff was found to be able
12 to lift ten pounds overhead at the time. Tr. 296.

13 The medical evidence in the record regarding plaintiff’s ability to reach overhead thus supports the
14 limitations the ALJ imposed on her in this functional area, including the physical capacities evaluation the
15 ALJ relied on at the hearing. See Tr. 236-41. With respect to the ALJ’s determination to limit plaintiff to
16 performing fine manipulation occasionally with the dominant right hand (Tr. 393), rather than bilaterally, the
17 evidence in the record generally supports that determination as well. In February 1998, Dr. Brack noted
18 limitations in plaintiff’s ability to finger, but, again, did not specify those limitations. Tr. 164. He thought
19 that she could return to “some form of gainful employment under a light duty status,” as long as she did not
20 perform “repetitive motions with her hands and wrists.” Tr. 190.

21 In mid-May 1998, plaintiff reported that her left wrist was “doing reasonably well,” with only “mild
22 decreased range of motion.” Tr. 189. She also did “reasonably well” in terms of her right hand following
23 carpal tunnel release surgery for nearly a month, until she re-injured it in a fall in early July 1998. Id. In late
24 July, however, she was noted to have “made very nice headway” and “few complaints” with her left wrist.
25 Tr. 135 (emphasis in original). Thus, although plaintiff’s right wrist had “lost ground” because of the fall
26 after having shown initial improvement, her left wrist was “doing extremely well.” Tr. 135, 219. That wrist
27 continued to do “tremendously well” through late August 1998, while her right wrist remained “a major
28 problem.” Tr. 134, 188. In early October 1998, the left wrist again was noted to have “done well” and to

1 be “essentially asymptomatic.” Tr. 219.

2 In both early November and early December 2002, plaintiff was found to have full range of motion
3 in her wrists, with “no arthritic changes or muscle wasting noted.” Tr. 291-92, 301. Therefore, while the
4 evidence in the record supports a finding of limitation with respect to fine manipulation in the right wrist,
5 there is no such evidence concerning the left wrist. As such, the ALJ properly disregarded the opinion of
6 Dr. Deutsch regarding plaintiff’s ability to perform fine manipulation bilaterally in favor of the weight of the
7 evidence in the record that plaintiff was so limited only in regard to her right hand. Accordingly, the
8 undersigned finds the hypothetical question the ALJ posed to the vocational expert accurately described
9 plaintiff’s limitations, and thus was reliable.

10 IV. The ALJ Erred in Finding Plaintiff Capable of Performing Her Past Relevant Work or Other Work
11 Existing in Significant Numbers in the National Economy

12 Plaintiff argues the ALJ erred in finding her capable of performing both her past relevant work as a
13 receptionist and other work existing in significant numbers in the national economy. She asserts that the
14 limitations on overhead reaching and bilateral fine manipulation found by Dr. Deutsch, when presented to
15 the vocational expert, resulted in testimony indicating that she not only would be precluded from her past
16 relevant work, but from any other work as well. While the undersigned finds the ALJ erred in determining
17 that plaintiff was capable of performing her past work as a receptionist and the other work identified by the
18 vocational expert that she could do, it is not clear from the testimony of the vocational expert that plaintiff
19 actually would be precluded from performing those jobs.

20 At the hearing, the vocational expert testified that although the Dictionary of Occupational Titles
21 (“DOT”) defined the job of receptionist to require occasional fine manipulation, she felt that job actually
22 required the ability to perform that task frequently. Tr. 395, 399-401. The vocational expert also testified
23 that plaintiff could perform the job of charge account clerk, again based on the DOT defining that job to
24 require only occasional fine manipulation, while she believed it called for the ability to perform that task on
25 an occasional to frequent basis, or, more specifically, “a little more than occasional.” Tr. 396-97, 401-02.
26 As such, the testimony of the vocational expert in this case conflicts with the information contained in the
27 DOT concerning both jobs identified by the vocational expert that plaintiff could do.

28 The ALJ has the affirmative responsibility to ask the vocational expert about possible conflicts
between her testimony and information in the Dictionary of Occupational Titles (“DOT”). Haddock v.

1 Apfel, 196 F.3d 1084, 1091 (10th Cir. 1999); SSR 00-4p, 2000 WL 1898704. Before relying on evidence
 2 obtained from a vocational expert to support a finding of not disabled, therefore, the ALJ is required to
 3 “elicit a reasonable explanation for any discrepancy” with the DOT. Haddock, 196 F.3d at 1087; SSR 00-
 4 4p, 2000 WL 189704 *1.

5 In his opinion, the ALJ resolved the above discrepancies as follows:

6 The vocational expert testified that according to the DOT [sic] The receptionist and
 7 charge account jobs require only occasional fine fingering, which is within the capability
 8 of the claimant. The vocational expert opined, however, that both jobs require more
 9 than occasional fine fingering. Because she gave no persuasive justification for her
 10 deference⁵ I accept and adopt the DOT’s classification of the fine fingering
 11 requirements for both jobs.

12 Tr. 27. At the hearing, however, the ALJ merely inquired as to why the DOT defined the job of charge
 13 account clerk to require occasional fine manipulation. Tr. 397. The ALJ did not ask the vocational expert
 14 why her opinion differed from that of the DOT. As such, it is unclear how the ALJ could determine that the
 15 vocational expert’s “justification” was not persuasive, as she gave none. In terms of the receptionist
 16 position, on the other hand, the vocational expert did provide an explanation. She testified that she was
 17 basing her disagreement with the DOT on the jobs she had seen and analyzed. Tr. 401. Here too, though
 18 fairly general in nature, the ALJ did not conduct any further inquiry into the vocational expert’s testimony
 19 on this issue, nor, as noted above, did the ALJ state in his decision why that testimony was unpersuasive.
 20 For these reasons, the undersigned finds the ALJ’s explanation was not reasonable.

21 Plaintiff argues that the vocational expert further testified that a limitation to occasional bilateral
 22 reaching would preclude her from performing all work. This, however, is not an accurate description of the
 23 vocational expert’s testimony. While the vocational expert did testify in response to questioning from
 24 plaintiff’s attorney, that a limitation to occasional bilateral reaching would “impact most every job,” she did
 25 not testify that such a limitation would prevent the hypothetical individual from performing any job. Tr. 402.
 26 It is true that the vocational expert also went on to testify that if this individual had to just leave “her hands
 27 in front of her,” there would not be any job which would allow for that. Id. Indeed, this is what one would
 28 expect, even without the testimony of a vocational expert. Nothing in the record though, indicates or even
 suggests plaintiff is so limited that she cannot move her hands.

⁵The undersigned assumes the ALJ meant “difference” as opposed to deference here.

1 In any event, the opinion plaintiff relies on, that of Dr. Deutsch, merely provides that she is limited
2 to occasional bilateral overhead reaching. Tr. 257. With respect to this limitation, however, the vocational
3 expert gave no testimony. In addition, as discussed above, the ALJ did not err in excluding this limitation
4 from the hypothetical question posed to the vocational expert. The argument that plaintiff should be found
5 disabled based on the vocational expert's testimony that a limitation to occasional bilateral fingering would
6 "greatly erode the labor market even more" (Tr. 402), also is without merit. Again, the vocational expert
7 did not testify that such a limitation would eliminate all possible jobs. As discussed above, furthermore, the
8 evidence in the record does not establish that plaintiff's fingering limitation was bilateral, but rather shows
9 that it was largely limited to her right hand. Because there is no vocational expert testimony as to the effect
10 of that limitation, it is unclear whether it in fact would be disabling.

11 Plaintiff further challenges the ALJ's determination with respect to her ability to perform her past
12 job as a receptionist based on statements from her state department of labor and industries counselor. That
13 counselor stated in mid-November 2000, that "[d]ue to her work related injury," plaintiff was "unable to
14 perform" the tasks involved in the job of medical biller. Tr. 150. According to the counselor, those tasks
15 normally required "the use of eyes, hands, and fingers to operate the keyboard of a clerical machine quickly
16 and accurately and the ability to perform repetitive activities and work with speed and accuracy." Id. It is
17 not clear, however, why plaintiff's counselor felt her "work related injury" precluded her from performing
18 these tasks. It also is not clear from the record that these tasks are directly applicable to, or sufficiently the
19 same as, those required for performing the jobs of receptionist and charge account clerk so as to make a
20 comparison here appropriate. In any event, as discussed above, the weight of the evidence in the record
21 does not necessarily establish that plaintiff is precluded from doing all work.

22 Lastly, plaintiff argues the ALJ committed reversible error when he substituted his own opinion for
23 that expressed in a "vocational decision worksheet" completed in early October 2001, indicating she could
24 not perform any of her past relevant work. Tr. 115. That worksheet merely contains boxes to be checked
25 indicating whether plaintiff was capable of performing either her past relevant work or other work and a
26 brief statement that plaintiff had a residual functional capacity described as "light, occasional OH reaching
27 and fingering. Id. As discussed above, however, the medical and other evidence in the record supports the
28 ALJ's assessment of plaintiff's residual functional capacity and the limitations included in the hypothetical

question he posed to the vocational expert. Thus, to the extent plaintiff is asserting the ALJ was bound by the opinion contained in this worksheet without regard to the other evidence in the record concerning her impairments, the undersigned finds that assertion to be without merit.

V. This Matter Should Be Remanded for Further Administrative Proceedings

The court may remand a case “either for additional evidence and findings or to award benefits.” Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996). Benefits may be awarded where “the record has been fully developed” and “further administrative proceedings would serve no useful purpose.” Id.; Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant’s] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because issues remain with respect to whether or not plaintiff is capable of performing her past relevant work and other work existing in significant numbers in the national economy, this matter shall be remanded to the Commissioner for further administrative proceedings.

CONCLUSION

Based on the foregoing discussion, the court finds the ALJ improperly determined plaintiff was not disabled. Accordingly, the ALJ’s decision hereby is REVERSED and REMANDED to the Commissioner for further administrative proceedings in accordance with the findings contained herein.

DATED this 9th day of January, 2006.



Karen L. Strombom
United States Magistrate Judge